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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/706,420	11/12/2003	Robert Murray	40002-12017	6802
61146	7590	08/14/2006	EXAMINER	
PEPSICO, INC. c/o GOODWIN PROCTER LLP EXCHANGE PLACE BOSTON, MA 02109			PRATT, HELEN F	
			ART UNIT	PAPER NUMBER
			1761	

DATE MAILED: 08/14/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/706,420

Applicant(s)

MURRAY ET AL.

Examiner

Helen F. Pratt

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 02 May 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-184 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-184 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

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The allowance of the instant claims has been rescinded in favor of the action found below.

DETAILED ACTION

Claim Rejections - 35 USC § 112

Claims 50, 55, 62, 123, 131, 138, 170, 174, 178, 182 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The claims are indefinite in the use of the phrase "from about 40 to about 78 MEQ/L of ions which favor the filing of the extracellular fluid compartment" is indefinite in that it is not known which ions applicants are referring to.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

.(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 2, 4-6, 7-9, 10, 50, 51, 54, 69-75, 93-99, 101-107, 123, 124, 129, 145, 146-151, 169-170, 171, 173, 175, 177, 178, 179, 181-183 are rejected under 35 U.S.C. 102(b) as being anticipated by Auzerie (FR 2770778 A1).

Auzerie discloses a rehydration solution composition as in claims 1 and 4-6, 7-9, 10 containing 20-75 meq chloride, from 0-50 meq potassium, and 40-75 meq of

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sodium. The composition contains water since it is a solution. The osmolality is from 150-350 m.osml. (abstract and page 2, lines 15-24).

Sucrose and glucose are disclosed as in claim 2 (abstract).

The particular amounts of carbohydrate is disclosed in claim 50, since the osmolality has been shown, and the claimed amounts of ions as in steps b and c which are sodium and chloride as in claim 54.

The limitations of claims 69-75 are disclosed on page 10, lines 8-16. The beverage composition is seen to promote fluid retention and stimulate voluntary fluid consumption since the composition has been shown.

The amounts as in claim 93 have been disclosed, which is to a concentrate. The concentrate would have to contain water, if it is in solution form as in claim 94 and is a sports beverage since the composition is the same and rehydration is important in a sports beverage (page 10, lines 6-16).

Electrolytes are sodium, and potassium as in claim 96, the carbohydrates are glucose and saccharose as in claim 97 and both are included as in claim 98, and sucrose and glucose are disclosed as in claim 99 (page 10, lines 6-16).

Amounts are disclosed as in claims 101-107 ((page 10, lines 6-31).

The limitations of claims 123, 124, 129, 145, 146-151, 169-170, 171, 173, 175, 177, 178, 179, 181-183 have been disclosed above.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 3, 11-49, 52, 53, 55-68, 76-92, 100, 108-122, 125-128, 130-144, 152-168, 172, 174, 176 and 180 are rejected under 35 U.S.C. 103(a) as being unpatentable over Auzerie (FR 2770778 A1) in view of Howard et al. (5,968,544) and Kuznicki et al. (5,681,569).

Claim 3 further requires a minimum of various kinds of carbohydrates. Howard et al. disclose that it is known to use starch and sugars in a composition containing electrolytes, flavors, coloring agents and clouding (col. 3, lines 55-60, col. 4, lines 5-22). Kuznicki et al. disclose a beverage containing electrolytes and carbohydrates (abstract and col. 6, lines 10-15). The carbohydrates can be sucrose, corn syrup, high fructose

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corn syrup and sugar. Therefore, it would have been obvious to use known carbohydrates, with a minimum of types of carbohydrates, clouding agents and coloring agent, in the composition of Auzerie for their known functions particularly as the references also disclose the use of electrolytes.

Various amounts of calcium and magnesium are disclosed as in claims 11 and 12, 15, 26 as in Howard et al. (col. 4, lines 11-22). The use of particular amounts is seen as being within the skill of the ordinary worker. Howard et al. disclose that it is known to add minerals in amounts to provide the correct osmolarity. Therefore, it would have been obvious to use additional electrolytes in the composition of Auzerie for their known function and to give the correct osmolarity.

Claims 13 and 14 further require a flavoring agent and a clouding agent. Howard et al. as above discloses such. Particular amounts are seen as being within the skill of the ordinary worker. Therefore, it would have been obvious to use known flavoring agents and clouding agents in particular amounts for their known function in the composition of Auzerie (FR 2770778 A1).

The further limitations of claims 15-49, 52, 53, 55-68, 76-02, 100, 108-122, 125-128, 130-144, 152-168, 172, 174, 176 and 180 have been disclosed above and are obvious for those reasons.


Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Hp 8-10-06


HELEN PRATT
PRIMARY EXAMINER